Supreme Court U.S.
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No. 01-1555

IN THE

Supreme Court of the United States

KATHY W. FENTROY,

Petitioner,

v.

DILLARD TEXAS OPERATING LIMITED PARTNERSHIP,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION

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RESPONDENT'S ALTERNATIVE STATEMENT OF QUESTION PRESENTED

Did the Fifth Circuit reversibly err in determining that the evidence presented at trial was insufficient to support a claim for racially hostile working environment?

LIST OF PARTIES AND CORPORATE DISCLOSURE STATEMENT

The caption of the case includes the names of all parties, except that Respondent's proper name is "Dillard Texas Operating Limited Partnership." The only affiliated entity which is publicly traded is Dillard's, Inc., the general partner of Dillard Texas Operating Limited Partnership.

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COUNTERSTATEMENT OF THE CASE

Throughout all phases of this case leading up to trial, this was not a racial harassment case; it was a disparate treatment case. It was pled as a disparate treatment case, discovery was conducted by both parties as if it were a disparate treatment case, and both parties' summary judgment filings treated it as a disparate treatment case. However, apparently as a result of her interpretation of the trial court's summary judgment ruling, Petitioner chose not to present disparate treatment issues to the jury at trial; rather, the only issue presented to the jury was whether the Petitioner had been subjected to a racially hostile working environment.[1]

Despite the fact that Petitioner chose to assert only a racial harassment theory at trial, the fact pattern illustrated by her evidence did not fit that legal theory. Specifically, at trial, Petitioner, who worked as an Area Sales Manager over the Men's Department at the Dillard's department store in the Woodlands, Texas, testified about a litany of events which occurred over a period of seven years and which she considered to be negative,[2] but those events did not involve conduct that can be described as "harassment." Rather, the

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1. Supreme Court Rule 15.2 obligates Dillard's to point out any perceived misstatements contained in the Petition for a writ. The Petition for a writ states that the jury instructions were submitted "without objection," which is the first of many misstatements (others of which are noted in the numerous footnotes in this Brief). Both parties voiced numerous objections to the jury instructions, both verbally and in writing.

2. Although Petitioner testified about a number of events which she considered to be negative, nothing in the record supports the statement on page 4 of the Petition that she was "the only black ASM."

events described by Petitioner involved allegations consistent with a disparate treatment theory.[3] Those events are adequately summarized, albeit in the light most favorable to Petitioner, in the portion of the Fifth Circuit opinion which appears on pages 4a through 6a of the Appendix to Petition for a writ (hereinafter cited as, "App., p. __").[4]

The complaints Petitioner presented at trial basically fall into four categories. She complained about promotional decisions, even though the evidence showed that the only

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3. By acknowledging that Petitioner's allegations are consistent with a disparate treatment theory, Respondent does not concede that Petitioner's evidence was sufficient to establish violation of Title VII under a disparate treatment theory. In fact, Petitioner misinterprets the Fifth Circuit's opinion when she makes the following statements in her Petition for a writ: "The Court of Appeals found sufficient evidence of disparate treatment" and "The Court of Appeals agreed that Fentroy was subjected to disparate treatment because of her race." The Court of Appeals made no such affirmative findings. At best, it held open the possibility, for argument's sake, that the evidence presented at trial might have been sufficient to support a disparate treatment theory of liability; however, it did not make a specific holding that a sufficient showing of disparate treatment had, in fact, been made. Because Petitioner misreads the Fifth Circuit's opinion in this regard, her second and third "Questions Presented" are improperly framed, as they are based on conclusions which have not been established.

4. The Fifth Circuit's recitation of the facts makes clear that Petitioner is wrong when she states on page 17 of the Petition for a Writ that the Fifth Circuit "limit[ed] its review of the evidence to the [sic] Tillery's testimony that she was not aware of remarks about Fentroy's race or that Williams wanted Fentroy gone because she was African American." The Fifth Circuit reviewed the totality of the circumstances and made specific mention of Tillery only to illustrate that even the witness it considered "arguably the most damaging" did not testify about any facts that could be considered harassment.

time she specifically requested a promotion, she received one less than two months later. She complained that other employees, on occasion (and usually at different stores), received larger pay increases than she received; however, the evidence also showed that, at all times, Petitioner was more highly compensated than any of the employees to whom she compared herself.[5] She complained about the job assignment she received upon returning from a leave of absence that exceeded twelve (12) weeks;[6] however, she was unable to establish that any other employee was treated differently under similar circumstances.[7] Finally, she complained about various miscellaneous occurrences, such as having an assistant "taken away,"[8] being told she needed to improve inventory results, being disciplined for unsatisfactory inventory results,[9] being provided with fewer hours upon

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5. The fact that Petitioner was always more highly compensated than any of the employees to whom she compared herself renders the statement on page 4 of the Petition for a Writ that "some white ASM's received more money" a misstatement.

6. It is a misstatement to say that Petitioner's job assignment upon return from leave of absence resulted in "a cut in pay" of approximately $1,400 per month.

7. Because there was no evidence that any other employee retained their position under circumstances similar to Petitioner's, any statements to the contrary in the Petition for a writ are misstatements, including statements regarding Candis Gatewood.

8. Petitioner's "belief" that another ASM had an assistant is not supported by the record.

9. The Petition for a writ contains several misstatement with regard to the inventory situation. Petitioner was not "in so many words

(Cont'd)

return from leave of absence than she would have desired, having supervisors override her decisions on sales returns, and not being selected as a store auditor during the January, 1996 inventory. It should be clear that, although Petitioner "opined that her treatment was due to her race" (*see* App., p. 5a), all of the events she described are racially neutral on their face, they were sporadic and infrequent (occurring, at best, at the rate of one incident every couple of months), and they do not involve any type of intimidation, insult, ridicule, or any other conduct that could legitimately be described as harassment.[10] Accordingly, the Fifth Circuit held that Petitioner failed to establish the elements of a racially hostile working environment.

(Cont'd)
accused of theft." In fact, she admitted that the word theft was never used. Also, any statement indicating that white employees with inventory shortages were not treated the same as Petitioner is a misstatement. They were treated so much the same that even the respective disciplinary documents contained the exact same wording. Finally, there was never any testimony specifically stating that "white ASM's received a lot more damage dollars than black ASM's," or that any black ASM ever failed an inventory based on failure to receive damage dollars.

10. Based on the actual facts presented, any conclusory allegation contained in the Petition for a writ that Petitioner was "harassed," "intimidated," "ridiculed," or "insulted" is a misstatement.

REASONS FOR DENYING THE WRIT

I. The Fifth Circuit's decision in no way conflicts with prior decisions of the Supreme Court.

Although her arguments are not very clear, it appears that Petitioner attempts to argue that the Fifth Circuit's decision in this case conflicts with this Court's opinions in *Meritor Savings Bank FSB v. Vinson*, 477 U.S. 57, 106 S. Ct. 2399, 91 L. Ed. 2d 49 (1986) and *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 114 S. Ct. 367, 126 L. Ed. 2d 295 (1993). However, even a cursory examination of the Fifth Circuit's opinion reflects that it in no way conflicts with either *Meritor* or *Harris*.

The gravamen of this Court's decision in *Meritor* was its holding "that a claim of 'hostile environment' sex discrimination is actionable under Title VII. . . ." *Id.*, 477 U.S. at 73, 106 S. Ct. at 2408.[11] Therefore, in order for the Fifth Circuit's opinion to be in conflict with this Court's opinion in *Meritor*, the Fifth Circuit would have had to hold that a claim of "hostile environment" race discrimination is not actionable under Title VII. Of course, the Fifth Circuit did not make such a holding. In fact, it expressly recognized that racial harassment is actionable under Title VII, it set forth the elements which Petitioner was required to prove in order to establish her claim, and it ultimately determined that she had failed to establish those required elements. (App., pp. 3a-4a). Thus, far from conflicting with this Court's opinion in *Meritor*, the Fifth Circuit's opinion is entirely consistent with *Meritor*.

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11. Although this case involves claims of racial harassment and *Meritor* involved claims of sexual harassment, Dillard's does not dispute that a claim of "hostile environment" racial discrimination is also actionable under Title VII.

Similarly, the Fifth Circuit's opinion is entirely consistent with *Harris*. The gravamen of this Court's holding in *Harris* was its recognition that no psychological injury is necessary in order for a plaintiff to prevail in a "hostile work environment" case under Title VII. *Harris*, 510 U.S. at 22, 114 S. Ct. at 371. Accordingly, the Fifth Circuit's opinion in this case cannot be found to conflict with the Supreme Court's opinion in *Harris* unless the Fifth Circuit expressly found that psychological injury was necessary in order to prevail under a hostile work environment theory. The Fifth Circuit made no such holding; therefore, its opinion in no way conflicts with prior decisions of this Court.

II. The Fifth Circuit's decision is not in conflict with any of the decisions of other Courts of Appeals referenced by Petitioner but is, instead, consistent with the only other Court of Appeals to have considered a similar theory of the case.

Petitioner references several decisions of other Courts of Appeals in a section of her Petition which is entitled "Other Circuit Courts." Specifically, she references *Jackson v. Quanex Corp.*, 191 F.3d 647 (6th Cir. 1999); *Ercegovich v. Goodyear Tire & Rubber Co.*, 154 F.3d 344 (6th Cir. 1998); *Stahl v. Sun Microsystems, Inc.*, 19 F.3d 533 (10th Cir. 1994); *Andrews v. City of Philadelphia*, 895 F.2d 1469 (3d Cir. 1990); and *Hicks v. Gates Rubber Co.*, 833 F.2d 1406 (10th Cir. 1987). She references each of these cases for the general proposition that discriminatorily hostile or abusive conduct directed at someone other than the plaintiff can be probative in determining whether a discriminatorily hostile or abusive

work environment exists. Nothing in the Fifth Circuit's opinion is inconsistent with that proposition.[12]

In fact, the Fifth Circuit's opinion clearly demonstrates that it properly reviewed the "totality of the circumstances" which Petitioner urges. It specifically quotes the "totality of circumstances" test (App., p. 4a) and contains specific references to the trial evidence relating to treatment of other minority employees. (App. pp. 5a-6a). The real essence of the Petition for a writ rests in Petitioner's simple disagreement with the conclusion drawn by the Fifth Circuit after reviewing the totality of the circumstances that no evidence of racial harassment exists. Thus, in reality, Petitioner is not arguing that the Fifth Circuit's opinion is inconsistent with decisions of other circuits; rather, she is arguing that the Fifth Circuit made erroneous factual findings or misapplied a properly stated rule of law. Even if she were correct in those assertions, Supreme Court Rule 10 demonstrates that erroneous factual findings or misapplication of a properly stated rule of law are generally insufficient to warrant a grant of certiorari.

Of course, the Fifth Circuit did not make any erroneous factual findings, nor did it misapply the law. In fact, Petitioner is bound in this case by the "Agreed Applicable Propositions

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12. Because nothing in the Fifth Circuit's opinion is inconsistent with the proposition that discriminatorily hostile or abusive conduct directed at someone other than the plaintiff can be probative in determining whether a discriminatorily hostile or abusive working environment exists, Petitioner's first "Question Presented" is also improperly framed. The Fifth Circuit never held that racial comments were required to be directed toward a plaintiff in order to establish a hostile work environment under Title VII. It simply found that the evidence in this case was insufficient to support a racially hostile working environment claim.

of Law" which she authorized as part of the Joint Pretrial Order. Those "Agreed Applicable Propositions of Law" required Petitioner to establish all of the following elements (which are also recited in the Fifth Circuit's opinion) in order to establish a claim for racially hostile working environment:

(1) plaintiff belongs to a protected class;

(2) plaintiff was subjected to unwelcome racial harassment;

(3) the harassment complained of was based on plaintiff's race;

(4) the harassment affected a term, condition or privilege of employment; and

(5) the employer is liable for the harasser's conduct and knew or should have known of the harassment and failed to take prompt, effective, remedial action.

See also Shepherd v. Comptroller of Public Accounts of State of Tex., 168 F.3d 871, 873 (5th Cir. 1999). In addition, both the Agreed Applicable Propositions of Law and the Fifth Circuit opinion required Petitioner to show: (1) racially discriminatory intimidation, ridicule, and insults which are; (2) sufficiently severe or pervasive that they; (3) alter the conditions of employment; and (4) create an abusive working environment. *See also Harris*, 510 U.S. at 21, 114 S. Ct. at 370; *DeAngelis v. El Paso Mun. Police Officers Ass'n.*, 51 F.3d 591, 594 (5th Cir. 1995). The facts presented by Petitioner at trial do not satisfy these elements. The events about which she complains cannot be characterized as racial

harassment, nor do they involve any type of intimidation, ridicule, or insults — much less intimidation, ridicule, or insults which can be described as racially discriminatory. Accordingly, an additional ground for denying certiorari in this case is that the Fifth Circuit correctly decided it.

In an attempt to counteract her failure to satisfy the elements of a racially hostile working environment claim, Petitioner misrepresents the effect of the one Fifth Circuit case she references. *Huckabay v. Moore*, 142 F.3d 233 (5th Cir. 1998) does not stand for the proposition that difference in treatment of similarly situated employees is used determining whether a work environment is hostile on account of race, at least not when the difference in treatment is the type of non-harassing conduct alleged by Petitioner in this case. In *Huckabay* (which was a reverse discrimination case), white employees were subjected to harassing conduct which black employees were not subjected to. For instance, the plaintiff was "'assigned to standing in the rain on May 8, 1995' while blacks were allowed to take shelter." *Id.*, 142 F.3d at 240. These facts stand in stark contrast to the non-harassing conduct relied on by Petitioner in this case. On the other hand, the court in *Huckabay* specifically recognized that "demotion is a different sort of discrimination from the day-to-day harassment that makes [a] workplace a hostile environment." *Id.* at 239-240. Because the conduct identified by Petitioner in this case more closely resembles the demotion in *Huckabay* and not the harassing conduct, *Huckabay* actually works against Petitioner in this matter.

Finally, in the only other case Respondent has been able to locate in which the plaintiff attempted to prove racial harassment through a showing of disparate treatment, the Seventh Circuit stated its belief that incidents of alleged

disparate treatment cannot be characterized as rising to the level of a racially hostile working environment. *Johnson v. City of Fort Wayne, Indiana*, 91 F.3d 922, 938 (7th Cir. 1996). Simply put, the Fifth Circuit's decision is correctly decided and entirely consistent with the only other court of appeals to have directly considered a similar theory of the case. Accordingly, there is no reason for the Court to grant certiorari.

III. The question presented by this case is not the type of important federal question which would warrant the grant of certiorari because the question is unlikely to arise on a frequent basis.

The fact that Respondent has been able to locate only one other case directly addressing a similar theory as the one presented in this case also illustrates another basis for denying certiorari. Specifically, the theory of the case adopted at trial by the Petitioner is so unusual that it is unlikely to arise in other cases except in circumstances that would be considered anomalous.

Most of the time, if a plaintiff can present evidence of disparate treatment, she will assert a disparate treatment theory of discrimination. If she can also present evidence of a discriminatorily hostile working environment, she will assert harassment as an additional cause of action. Numerous cases illustrate that it is commonplace for the two theories to be asserted separately, but simultaneously. *See, e.g., Okruhlik v. University of Arkansas ex rel. May*, 255 F.3d 615 (8th Cir. 2001); *McPhaul v. Board of Commissioners of Madison County*, 226 F.3d 558 (7th Cir. 2000); *Allen v. Michigan Department of Corrections*, 165 F.3d 405 (6th Cir. 1999); *Mayfield v. Patterson Pump Co.*, 101 F.3d 1371 (11th

Cir. 1996); *Wallace v. Texas Tech University*, 80 F.3d 1042 (5th Cir. 1996); *Bolden v. PRC, Inc.*, 43 F.3d 545 (10th Cir. 1994). The fact that the two theories are distinct and require different types of proof is succinctly illustrated by a passage from Justice Thomas' dissenting opinion in *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742, 118 S. Ct. 2257, 141 L. Ed. 2d 633 (1998):

> Accordingly, after *Rogers*, a plaintiff claiming employment discrimination based upon race could assert a claim for a racially hostile work environment, **in addition to the classic claim of so-called "disparate treatment."** A disparate treatment claim required a plaintiff to prove an adverse employment consequence and discriminatory intent by his employer. A hostile environment claim required the plaintiff to show that his work environment was so pervaded by racial **harassment** as to alter the terms and conditions of his employment.

Id., 524 U.S. at 767-768, 118 S. Ct. at 2272 (Thomas, J., dissenting) (citations omitted, emphasis added).

There is no good reason for a plaintiff whose only evidence involves what is traditionally characterized as disparate treatment to eschew that theory in favor of a convoluted theory of racial harassment where the so-called harassment purportedly takes the form of disparate treatment. Accordingly, similar cases are unlikely to arise again in the future, so this case does not present the type of important federal question which would warrant the granting of certiorari.

CONCLUSION

Petitioner chose to assert only a racially hostile working environment theory at trial, despite the fact that none of her allegations or evidence involved conduct that could even remotely be described as "harassment." The Fifth Circuit correctly set forth the elements which a plaintiff is required to establish in order to prevail on a claim for racially hostile working environment — elements which are entirely consistent with previous opinions of this Court and with the "Agreed Applicable Propositions of Law" agreed to by Petitioner in the parties' Joint Pretrial Order — and correctly concluded that the evidence presented at trial was insufficient to support a claim for racially hostile working environment. The Fifth Circuit's decision in no way conflicts with previous decisions of this Court or other circuits. Furthermore, the theory of the case adopted by Petitioner in this matter is so unusual that it is unlikely to arise again in the future. For all of these reasons, Respondent respectfully requests that the Court deny the Petition for a writ of Certiorari.

Respectfully submitted,

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